Office Supreme Court, U.S.
FILED
JUL 24 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1957

No. 215

UNITED STATES OF AMERICA,

Respondent-Appellee,

v.

SAMUEL GOLDSTEIN,

Petitioner-Appellant.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

ARTHUR D. GOLDSTEIN,
Attorney for Petitioner,
Samuel Goldstein,
217 Broadway,
New York, N. Y.

INDEX

	PAGE
Petition	1
Opinions Below	1
Jurisdiction	2
Statement of Questions Involved	2
Statutes Involved	4
Facts	5
Basis for Federal Jurisdiction in the Court of First Instance	7
Reasons Relied on for the Allowance of the Writ	7
State or Federal Substantive Law of Property	9
"Choateness"	20
"Construction of Purchaser"	23
Conclusion	29
Appendix A—Opinion of Circuit Court	30
Appendix B—Judgment	32

Cases Cited

Application of City of New York, 154 N. Y. S. 2d 104	24
Carter v. Carter, 188 Misc. 156, 66 N. Y. Supp. 2d 768	27
Commissioner v. Stern, —— U. S. —— No. 311 (June 9, 1958)	9, 10, 14, 16, 17, 24, 25
Erie R.R. v. Tompkins, 304 U. S. 64	2, 9, 10, 11, 16, 17, 18, 24, 25
Filipowicz v. Rothensies, 43 Fed. Supp. 619	17
Herlihy v. Phoenix Assurance Company Ltd., et al., 274 App. Div. 342, 83 N. Y. Supp. 2d 707	7, 16, 17, 22
LaFar v. Grimes, 86 Fed. 2d 809	27

PAGE

Lavenburg v. Universal Sportswear, 198 Misc. 318, 98 N. Y. Supp. 2d 139 8
Lexow v. Tremaine, 232 App. Div. 307, 299 N. Y. S. 412 affirmed 277 N. Y. 637, 14 N. E. 2d 207 17
Marteney v. United States, 245 Fed. 2d 135 26
Matter of Meltzer v. Coglia (Carlin Homes, Inc.) 9 Misc. 2d 464 8
Matter of Peters, 271 App. Div. 518 8
McCulloch v. Maryland, 4 Wheaton (U. S.) 316 14
Panhandle Oil Co. v. Mississippi, 277 U. S. 218 15
Spense v. Bode, 57 Misc. 611, 108 N. Y. Supp. 593 .. 22
Swanson v. U. S., 156 F. 2d 442 Cert. Den. 329 U. S. 800 16
Ten Eyck v. Witbeck, 135 N. Y. 40 ..... 25, 26
United States v. Aeri, 348 U. S. 211 .....2, 9, 10, 11, 12, 17
U. S. v. Bess, —— U. S. —— (Nos. 395 and 410, June 9, 1958)) 9, 11, 12, 13, 17
United States v. City of New Britain, 347 U. S. 81 .. 10, 20
United States v. Collata, 350 U. S. 808 10
United States v. Gilbert Associates, 345 U. S. 361 .. 10
United States v. Samuel Goldstein, 58-1 U.S.T.C., Par. 9478-CCH, Par. 58-654 F.T.S. P. H., 152 F. Supp. 791 .....1; 2, 6
United States v. Coblentz, 4 N. Y. App. Div. 2d 869 (Case 10) lv. to app. gr. 4 N. Y. App. Div. 2d 947 (Case 23) 8
United States v. Pay-O-Matic Corp. & Samuel Goldstein, City of New York, R. L. Polk & Co. Inc. 58-1 U.S.T.C. 9327-CCH 2, 17, 23
United States v. R. F. Ball Construction Co., 355 U. S. 587 ..... 10, 20
United States v. Scovil, 348 U. S. 218 ..... 10, 26
United States v. Security Trust Company, etc., 340 U. S. 47 .....2, 9, 10, 11, 12, 17, 18, 24, 27

PAGE

United States v. Vorreiter, 355 U. S. 15 10
United States v. Waddill Co., 323 U. S. 353 .....2, 9, 10, 11, 12, 17
United States v. White Beer Brewing Company, 350 U. S. 1010 10

Statutes

New York State Judiciary Law, Section 475 (reprinted p. 6) 7, 22
United States Constitution, 5th and 14th Amendment 3, 15
26 United States Code 6321, 6322, formerly 3670, 3671 respectively (reprinted at p. 5) 3, 11, 15, 20
26 United States Code 6323, formerly sec. 3672 (reprinted p. 5) 2, 3, 20, 23, 24, 26
28 United States Code 1254(1) 2
28 United States Code 1345 7
Section 311 of Internal Revenue Code of 1939 ....10, 14, 15

Miscellaneous

1 Williston on Contracts, Revised Edition, Section 217 26
29 Rocky Mountain Law Review 167 (Feb. 1957) .8, 10, 13, 22
Thornton on Attorneys at Law 22
Address, Hon. Charles K. Rice, Jr., Ass't Atty-Gen., London (July 25, 1957; 575 CH Par. 6696) 9

IN THE

Supreme Court of the United States

October Term, 1957

No.

UNITED STATES OF AMERICA,
Respondent-Appellee,

v.

SAMUEL GOLDSTEIN,
Petitioner-Appellant.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

PETITION

Samuel Goldstein prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit made and entered April 28th, 1958 affirming the judgment of the United States District Court for the Southern District of New York.

The District Court on motion of the United States for Summary Judgment and on cross-motion of Petitioner for Summary Judgment rendered Judgment for the United States.

Opinions Below

The opinion of the Court of Appeals is reported at 58-1 U. S. T. C. Par. 9478-CCH and Par. 58-654 FTS PH. The opinion of the District Court for the Southern District

of New York is reported at 58-1 U. S. T. C. 9327-CCH. They have not been reported elsewhere.

An earlier opinion of the District Court (Levet *J.*) occasioned by the motion of Petitioner to dismiss for lack of jurisdiction of the subject matter is reported in 152 F. Supp. 791.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on April 28th, 1958. Jurisdiction of this Court is asserted under 28 United States Code Sec. 1254(1).

Statement of Questions Involved

1.A Can the prior decisions of this Court [1] dealing with United States tax liens [2] which were considered controlling in the court below, be reconciled with the principles of the doctrine of *Erie R.R.* v. *Tompkins* [3] in respect to the creation of a separate federal general common substantive law of property.

1.B Will the doctrine of *Erie R.R.* v. *Tompkins* [4] be applied in determining that petitioner, the holder of a specific and choate attorneys charging lien under state law has the same property rights and status in respect to a state condemnation award, he produced, when in competition with a lien of the United States Government as he would, with a like lien, not owned by the United States, under state law of property.

---

[1] *United States* v. *Waddill*, 323 U. S. 353 (1945); *United States* v. *Acri*, 348 U. S. 211 (1955); *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47 (1950).

[2] 26 U. S. C. § 6321, § 6322 and § 6323.

[3] 304 U. S. 64 (1938).

[4] 304 U. S. 64 (1938).

2. Must a "purchaser's" interests be measurable in dollars to be "choate", and must a "purchaser's" interest be "choate" at all?

3. Where no case in this Court before has dealt with a "purchaser", in construing same, shall the substantive law of the state be referred to, or shall the well defined and settled meaning in the jurisprudence of our country be accorded to it in accordance with probable legislative intention or will a different meaning be given.

4. May the United States allocate payments to junior liens and preserve its senior lien for enforcement with respect to which a competing lien might be inferior?

5. Shall the United States which would have had to pay for attorney's services, to realize on a taxpayers claim, be allowed to emerge from behind its secret lien, after an attorney has expended his time, money and efforts and claim the entire award, to the exclusion of the attorney, even for his expenses, where the United States knew or should have known that an attorney's services would be necessary to produce the proceeds.[5]

6. May the United States under all the facts and circumstances in this case and after agreement by one of its agents to permit the attorney to collect his fee then stand by till the attorney has completed his work and exclude the attorney's receipt of his fee and disbursements?

7. Is it violative of the due process provisions of the 5th and 14th Amendments of the United States Constitution to give priority to a lien of the United States over that of a third party when existence of the lien of the United States is unknown and unknowable to third parties.

---

[5] 26 U. S. C. 6323.

Statutes Involved

TITLE 26, UNITED STATES CODE, SECTION 6321

Page 1070, Supplement III

§ 6321. *Lien for taxes.*

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 779.)

TITLE 26, UNITED STATES CODE, SECTION 6322

Page 1070, Supplement III

§ 6322. *Period of lien.*

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time. (Aug. 16, 1954, 9:45 a.m., E.D.T., ch. 736, 68A Stat. 779).

TITLE 26, UNITED STATES CODE, SECTION 6323

Pages 1070-1, Supplement III

§ 6323. *Validity against mortgagees, pledgees, purchasers, and judgment creditors.*

(a) *Invalidity of lien without notice.*

Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

(1) *Under State or Territorial laws.*

In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; * * *.

SECTION 475 OF THE JUDICIARY LAW OF THE STATE OF NEW YORK

Page 422 of McKinneys Consolidated Laws of New York Annotated

§ 475. *Attorney's lien in action, special or other proceeding.*

From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing counterclaim, the attorney who appears for a party has a lien upon his client's cause of action, claim, or counterclaim, which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor, and the proceeds thereof in whatever hands they may come; and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. As amended L. 1936, c. 876; L. 1938, c. 34; L. 1946, c. 105, eff. Sept. 1, 1946.

Facts

The facts are not in dispute. Pay-O-Matic Corp. was delinquent in the payment of certain withholding taxes for 1954 and 1955 to the United States. On August 5, 1955 the City of New York vested title to certain of Pay-O-Matic's property in a condemnation proceeding, i.e. Washington Square Southeast Slum Clearance. On August 15, 1955 the Collector of Internal Revenue assessed Pay-O-Matic Corp. in the sum of $6,947.42. On November 15, 1955 a second and third assessment in the sum of $4,500.78 was made. All assessments were not only not known to Petitioner or

the Public, but not knowable as well. On November 18, 1955 the petitioner was retained as attorney in the condemnation proceeding and Pay-O-Matic Corp. provided therein (7A) that it "hereby retains Samuel Goldstein & Sons as its attorneys to represent it in the above proceeding, and agrees to pay and hereby assigns to said attorneys for their services twenty-five (25%) percent of any award and interest that may be made for trade fixtures contained in said property". An appraisal was ordered and made pursuant to Petitioner's request by an appraisal expert who thereafter rendered his bill in the sum of $140.00 which is a fair and reasonable value of the services rendered. A photographer was engaged who took photographs of the property. Petitioner performed all necessary services in representing his client in the condemnation proceeding. On December 12, 1955 the United States filed a notice of tax lien in the Register's office of New York County in the sum of $11,629.44. Thereafter Pay-O-Matic Corp. paid the sum of $9,856.12. In the schedule annexed to respondent's complaint it is shown that only $7,166.25 of this payment was applied to this lien. The unpaid portion of this lien would then be $1,773.32 and there would then remain a sufficient amount in the condemnation award to pay petitioner's fee and disbursements in the sum of $1,294.32. On February 23, 1956 a fourth tax assessment of $3,254.77 was made against Pay-O-Matic Corp. During the early Spring of 1956 Mr. Guzzetti, Collection Officer of the Bureau of Internal Revenue, called and spoke to Samuel Goldstein, Esq., stating that the federal government had a tax lien against his client-taxpayer Pay-O-Matic Corp.; that the government would in all events allow the attorney to collect his fee and asked to be advised when the award would be ready for collection. Thereafter in the condemnation proceeding, on March 30, 1956, as a result of a conference between petitioner and the condemnor's attorney it was agreed to settle the claim of Pay-O-Matic Corp. for the sum of $4,350 and on April 17, 1956 a stipulation of such

settlement was signed by Pay-O-Matic Corp. On June 28, 1956 an amended notice of tax lien was filed in the Register's office of New York County. On August 22, 1956 the decision of the New York State Supreme Court was published which incorporated the aforesaid stipulated settlement of the amount of the award and on September 25, 1956 that court signed the final decree.

Basis for Federal Jurisdiction in the Court of First Instance

The United States instituted this action in the District Court for the Southern District of New York pursuant to 28 United States Code 1345, to enforce collection of unpaid withholding tax liens and to enjoin proceedings brought by Petitioner in the New York State Supreme Court to enforce his attorney's lien, under § 475 of the New York State Judiciary Law.

Petitioner appeared in the District Court and objected to the jurisdiction of that Court over the subject matter herein and moved to dismiss. Levet, *J.* denied Petitioner's motion. (See 152 Fed. Supp. 791.)

Reasons Relied on for the Allowance of the Writ

The reasons relied on for the allowance of the writ of certiorari by this Court are:

A. The Court of Appeals and District Courts decisions are in conflict with applicable decisions of the New York State Courts, and disregard the settled state substantive law of property relying on a federal general law. The decision of the Court below is in square conflict with the holding of the Courts of the State of New York in:

1. *Herlihy v. Phoenix Assurance Company Ltd., et al.*, 274 App. Div. 342, 83 N. Y. Supp. 2d 707.

2. *Lavenburg* v. *Universal Sportswear*, 198 Misc. 318, 98 N. Y. Supp. 2d 160.
3. *Matter of Meltzer* v. *Ceglia (Carly Homes, Inc.)* 9 Misc. 2d 464.
4. *United States* v. *Koblentz*, 4 N. Y. App. Div. 2d 869 (case 10), lv. to app. gr. 4 N. Y. App. Div. 2d 947 (case 23).
5. *Matter of Peters*, 271 App. Div. 518.

Innocent parties relying upon the established substantive rules of property, have been called on to pay the delinquent taxes of others.

See 29 Rocky Mountain Law Review, page 167.

B. The questions here involve important and basic questions:

1. In the interpretation of the federal tax lien law which has not been settled by this court before.

2. Involving the unsettling effect of misinterpreted previous decisions of this court on long settled property rights.

3. In the administration of the tax laws and the intended fair and in the long range, most effective and productive method thereof.

4. On the effectiveness of any guarantee of a right to counsel where a client is even prior to any determination of his tax liability, deprived of an ability to pay Counsel for his services.

5. Involving the relation of the state and federal governments in the making of substantive laws of property.

6. On the right of an attorney who has produceed a fund for a taxpayer-client and enabled the United States

thereby to collect its taxes to be paid his fees and expenses out of the recovery.

C. Some of the questions, here on first impression, involve an area of law of nationwide concern that has recently caused a yet ever growing flood of federal litigation, now the second largest case load handled by the Department of Justice (after refund suits).[6]

I.

STATE OR FEDERAL SUBSTANTIVE LAW OF PROPERTY

The rule laid down by this Court in *United States* v. *Waddill*, 323 U. S. 353; *United States* v. *Security Trust and Savings Bank*, 340 U. S. 47, and *United States* v. *Acri*, 348 U. S. 211, 213, that "the relative priority of the lien of the United States for unpaid taxes is, * * * always a federal question to be determined finally by the federal courts" and that "the state's characterization of its liens, while good for all state purposes does not necessarily bind this Court", and quoted and cited in the District Court's decision herein and the decision in *U. S.* v. *Bess*, ——U. S. ——[7] that "state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States" is in conflict with *Erie Railroad* v. *Tompkins*, 304 U. S. 64 and recent decisions of this Court which this Court should reexamine.

This Court has recently decided *Commissioner* v. *Stern*, No. 311 (June 9, 1958) which raises the question of whether there can be a separate substantive federal law of property

---

[6] Address Hon. Charles K. Rice, Jr., Asst. Atty-Gen., London (July 25, 1957; 575 CCH Par. 6696.)

[7] (No. 395 and 410 June 9, 1958.)

and thus throws into question the *Waddill*, *Acri*, and *Security Trust* cases, *supra*, etc.

This Court has rendered some few decisions that appear to lay down the doctrine that there is a separate federal, general, or common law by which federal courts alone can reshape all bundles of rights under state law, to fasten United States liens upon them or to divest them from the "res" to which they are attached.

1. *United States* v. *Waddill*, 323 U. S. 353 (1945).
2. *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47 (1950).
3. *United States* v. *Gilbert Associates*, 345 U. S. 361 (1953).
4. *United States* v. *City of New Britain*, 347 U. S. 81 (1954).
5. *United States* v. *Acri*, 348 U. S. 211 (1955).
6. *United States* v. *Scovil*, 348 U. S. 218 (1955).
7. *United States* v. *Colotta*, 350 U. S. 808 (1956).
8. *United States* v. *White Bear Brewing Co.*, 350 U. S. 1010 (1956).
9. *United States* v. *Vorreiter*, 353 U. S. 15 (1957).
10. *United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587 (1958).

The mischief this doctrine has played with settled property rights is very ably set forth in the article by Harold Reeve, Esq., then Chairman of the American Bar Association's Committee on Relative Priority of Government and Private Liens in 29 Rocky Mountain Law Reviews 167 (Feb. 1957). And later reports of that committee authored by its present chairman, Earl Q. Kullman, Esq.

In the *Stern* case, *supra*, this Court applied the doctrine of *Erie* v. *Tompkins*, *supra*, in the case of construction of section 311 of the Internal Revenue Code of 1939, which provides the procedure for pursuing a taxpayers property into the hands of a "transferee". It held that when Congress spoke of a "transferee" it was only speaking of a

"transferee" under state substantive law of property. This Court did not then discuss, as it did in *Erie*, *supra*, Congress' power to create a federal general common law. There is sense and justification to this position which we discuss below.

In the *Bess* case, *supra*, decided at the same time, a federal tax lien was involved, just as here, under the predecessor section to 6321, section 3670. Because there was a lien, this Court, applied a part *Erie*, *supra*, (part state and part federal law) which unlike the *Waddill*, *Acri*, and *Security Trust* cases, *supra*, did not entirely abandon the substantive state law of property in favor of a federal general common law in dealing with the competing interests in the property. As to the property, this Court held:

> "It would be anomalous to view as 'property' subject to lien proceeds never within the insured's reach to enjoy * * *"

and

> "Since § 3670 creates no property rights but merely attaches consequences, federally defined, to rights created under state law * * * we must look first to Mr. Bess' right in the policies as defined by state law."

Having found a right in the taxpayer and defining it by reference to the substantive law of the state this Court then held that that specific interest created by state law that was in the taxpayer was subject to the lien. But this Court drew a division line that sets an impossible goal without saying how it is henceforth to be arrived at.

> "However, once it has been determined that state law creates sufficient interests in the insured to satisfy the requirements of § 3670, state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States."

But one of the total interests that was not within the taxpayer's reach to enjoy was the right to lien or charge the property with his debts. It was not part of his security.

But this Court accordingly ruled that the right created by state rule of substantive law which was as much a part of the property owned by the taxpayer as any of the other rights incident thereto which made the property not subject to creditors liens, can and should be disregarded. When it comes to federal tax liens, what this Court did was to disregard a state substantive rule of property which worked a limitation on the full and absolute ownership of the taxpayer to which the lien could attach and not merely strike down a state bar to the attachment of the federal lien. This rule makes the federal lien attach more than the taxpayer owned under state law, and in many cases treads on a staked out interest in the property. The federal government cannot get more than the taxpayer could give.

This rule (*Bess, supra*), is a far better one than the *Waddill, Acri,* and *Security Trust* rule which disregards all state substantive rules of property and sets up a reshaping federal general or common law as to the competing lien to achieve a uniform tax result. But there is no discernible reason why a total general law (*Waddill, supra*) should reshape the competing lien and only a partial general law (*Bess, supra*) reshape the property itself. There is no deserving policy served by either rule. The desire for uniformity of federal taxes cannot be accomplished even under the severe *Waddill, supra*, etc. rule, the rule of *Bess, supra*, is unexplainable, and the rule of *Erie* and of *Stern* is preferable.

The *Erie* and *Stern* doctrine is more desirable and the objective of a federal law is impossible.

First, the *Erie* and *Stern* doctrine tends to more stability and security in state titles. It does not upset long

established and settled rights. See 29 Rocky Mountain Law Review 167. Having two sets of substantive laws, state and federal, characterizing the same property, makes it difficult for one to plot his legal course in relation to rights and liabilities. Situations will develop where one is damned if one does and equally damned if one doesn't. That is, one may have to, in order to make one secure from the claim of a tax lien, lose one's protection as against other liens, and vice versa. Federal general law misdescribes the ownership of interests in a property, as it is, which is the description of state law.

Second, federal decisions formulating what the substantive laws of property shall be or as in *Bess, supra*, whether any of the state rules that bar the federal lien will be disregarded, will be necessarily episodic, and relatively infrequent. This will lead to more confusion and doubt as to what the federal court's position possibly could be. It is neither desirable nor within our jurisprudential policy to foment unrest in titles.

Third, the goal of uniformity to be achieved by a general common law of property is: (1) impossible of achievement; (2) is inapplicable to a lien situation.

(1) The goal of uniformity is impossible of achievement because certainly a minimum amount of state substantive law must be used to determine what interests a taxpayer has and that may vary between the states. Then again, if the competing lien were not to be accorded a full property status under a state law, to achieve uniformity with a federal general law standard this Court consistently would have to accord it an equal property status, such as it might have had in another state. This Court has shown that it is not prepared to do this.

(2) The policy of the law behind uniformity is the goal of achieving equal liability of all taxpayers regardless of

the fortuitousness of location. (Mr. Justice Black's dissent in *Stern, supra*). (a) Actually, this has no relation to the problem of government and private liens. A private lienor has no liability for the federal taxes. He is merely an innocent third party with property rights established and secured by state law in accordance with a state's entire scheme of the interrelation and priority of rights. He purchased or allowed himself into his situation because the states law secured his rights. He is in this respect no different than the "transferee" in the *Stern* case, *supra* (Under § 311).

(b) Uniformity does not prevent shopping for a jurisdiction. Lienors and potential lienors enter into their situation under the states scheme of law in accordance with its framework of risks (priority between it and other creditors). They do shop in this regard and nothing is wrong with them doing so. With a uniform general law, they will still shop, though with far less certainty of their position, and they will shop with relation to the normal attributes of property in the scheme of things under state law also. There is nothing in uniformity that prevents shopping for minimum risks of a poor title.

Then again, some competing lienors, such as lawyers who practice in one state only, are not in any position to shop for a jurisdiction. Location of the property makes shopping impossible in the case of interests in real property and other immovables.

Fourth: There also seems to be an implicit and unspoken two-sided reason that favors a uniform federal general law. There is a fear that in allowing the states a control over the federal government's pursuit of its tax revenues, that the states will favor the individual's or the state's interest over the federal governments or that the states will throw obstructions in the way of the federal government's collections. (the approach of *McCulloch v. Marg-*

land, 4 Wheaton (U. S.) 316). To expose the thought though is to reveal its nakedness. "Not * * * while this Court sits".* * * (Holmes *J.* dissent *Panhandle Oil Co.* v. *Mississippi*) 277 U. S. 218, 223 (1928). This Court can always strike down discriminatory state legislation having as its result the putting of a federal tax lien in a worse position than a similar other lien. But there is no compelling reason to grant its superiority.

The other side of the same reason is a desire to put the federal tax lien on a superior footing because it is the federal government's lien. This is the only justification consistent with a federal general substantive law. Aside from this consistency which is a poor reason, Congress never expressed such reason, never intended it, and this Court should not find it ample justification for all the mischief a federal general law creates.

Fifth: The reasons that this Court sets forth in *Stern*, *supra*, why Congress did not intend to set up a separate federal substantive general common law in relation to Section 311 of the Internal Revenue Law of 1939 applies as well to Section 401 of that law, now 26 U. S. C. 6321 which is applicable here.

Sixth: Property under the Fifth and Fourteenth Amendments to the U. S. Constitution is property created by the substantive law of the states. Let's take an example. If the federal government wished to exercise its right of eminent domain and take a property subject to an attorney's charging lien, could the United States disregard the attorney's property rights under state law and set up different or additional requirements to be considered. We suggest not.

Another parallel is suggested. Would it be proper in order to promote a uniformity of the federal government's power of eminent domain, in order that compensation be

not determined by the fortuitousness of location, to hold invalid the title of and refuse to compensate an owner of a fee simple absolute under the laws of Ohio because under a federal general common substantive law of property, he had no title? Or it was inchoate? See *Swanson* v. *U. S.*, 156 F. 2d 442. Cert. den. 329 U. S. 800.

We suggest that Congress, in writing the tax law, was mindful that in the taking or depriving of property under its power of eminent domain, its enumerated power, its police power, or its tax power, the substantive law of property is state law only.

We now come to the application of all that has been said to the facts of the instant case. The federal government had a right to collect taxes from Pay-O-Matic Corp. None against the Petitioner Pay-O-Matic had property which was taken in condemnation proceedings under state law. The chose in action that Pay-O-Matic Corp. owned was state created. The property interest and lien that Petitioner had was state created. *Erie* and *Stern, supra,* both should require a holding that when the government attempted to impose its lien on a state created property, it took that property in the form it came. Petitioner's and Pay-O-Matic Corps.' interest was governed by state law.

The nature of the taxpayers and the attorney's property was made clear in *Herlihy* v. *Phoenix Assurance Co.*, 274 App. Div. 342, 83 N. Y. Supp. 2d 207, which views a chose in action as incapable of sustaining general liens, (such as tax liens), but the specific lien of an attorney can and does attach from the inception of the action.

This is because of the limited nature of the interest in the chose in action in its possessor.

The state rule is: All choses in action are burdened from their inception with the ultimate costs of reducing said chose to tangible form. The owner of the chose never has full and clear title to it and is incapable of alienating

the full chose, and whoever liens said chose is charged with notice of these costs and takes his lien subject to same, Attorney's liens and disbursements are part of the ultimate costs of reducing the chose to a tangible form and are entitled to priority over all other liens regardless of when they arose. See list of cases pp. 7-8, *supra*.

Thus it has been held that a prior assignment made by the owner of the chose in action is ineffective as against a later attaching attorney's lien. *Lexow* v. *Tremaine*, 232 App. Div. 307, 299, N. Y. Supp. 412, affirmed 277 N. Y. 637, 14 N. E. 2d 207. See the discussion of its meaning in *Herlihy* case, *supra*.

The District Court ably set forth the nature of an attorney's liens under New York State law. It indicated that the attorney's lien is considered choate under state law, it is a property right, and is attached at the commencement of the state condemnation proceeding, August 5, 1955. Under New York State Law the attorney's lien is choate.

This is the state rule in New York that under *Erie* and *Stern*, *supra*, should govern here; but if this Court were to disregard *Erie* and *Stern* and follow *Waddill*, *Acri*, *Security Trust* and *Bess*, *supra*, it surely is the most just rule to follow in setting up a federal property law. Then 26 U. S. C. 6321 should be read as only affixing the federal tax lien on the right to the proceeds part of the chose in action, the other part being necessary for attorney's fees in order to reduce the chose to tangible form. This is what the Third Circuit apparently did in *Filipowicz* v. *Rothensies*, 43 Fed. Supp. 619. But if *Bess*, *supra*, were to be applied, then it is to be noted that New York State law does not envisage a full property of the chose in action in Pay-O-Matic Corp. Only that portion of the chose that is collectible after the fees for attorneys are paid are the taxpayers property. The attorneys portion was never subject to the federal tax lien.

• • •

Petitioner has attempted to show that the *Woodill*, *Acri* and *Security Trust* doctrine, that there is a uniform federal substantive general common law is wrong. We maintain that there is no sound policy reason why it should be the law and that there are strong reasons why it should not be. While this Court shows no signs in past tax lien decisions of having considerd this, this is really not a new argument before this Court, and we cite this Court's language in *Erie* v. *Tompkins*, 304 U. S. 64, when it held as a matter of constitutional limitation as well as Congressional intention, that (p. 78):

> "There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general', be they commercial law or a part of the law of torts. And no clause in the constitution purports to confer such a power upon the federal courts."

This general common law which Congress had no power to declare was said to have included (pp. 75-76):

> "* * * even where the question of liability depended upon the scope of a property right conferred by the State * * * Furthermore state decisions construing local deeds, mineral conveyances, and even devises of real estate were disregarded."

Even the arguments we raise herein are similar (p. 74):

> "Experience in applying the doctrine of Swift v. Tyson, had revealed its defects, political and social; * * * and the impossibility of discovering a satisfactory line of demarcation between the province of general law and that of local law developed a new well of uncertainties."

And we ask this Court in the paraphrase of Mr. Justice Holmes not to hesitate to review and to correct an erroneous assumption of powers by courts of the United States

which no lapse of time or respectable array of opinion should freeze (p. 79):

> "The fallacy underlying the rule declared in *Swift* v. *Tyson* is made clear by Mr. Justice Holmes. (*Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 370-372; *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518, 532-36). The doctrine rests upon the assumption that there is a 'transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,' that federal courts have the power to use their judgment as to what the rules of a common law are; and that in the federal courts 'the parties are entitled to an independent judgment on matters of general law':
>
> 'but law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else * * *' the authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.'
>
> Thus the doctrine of *Swift* v. *Tyson* is, as Mr. Justice Holmes said, 'an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct.' In disapproving that doctrine we do not hold unconstitutional § 34 of the Federal Judiciary Act of 1789 or any other Act of Congress. We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several States."

II.

"CHOATENESS"

Under federal substantive general common law the attorney's lien need not have been, but was "choate".

The Circuit Court, in the instant case, cited *U. S. v. R. F. Ball Construction Company, Inc., et al.*, 355 U. S. 587 (1958), in affirming the District Court's decision herein. In *U. S. v. R. E. Ball Construction Company, Inc.* the defects claimed by the government there bears no relation to the supposed defect that the government and courts below adverted to in the instant case. The government claimed and the lower courts held in the instant case that there was not an "established * * *amount" and to both, this meant that the lien was "imperfected" and "inchoate" and federal general common law requires liens to be "perfected" and "choate" and, of course, Sections 6321, 6322, 6323 employ a separate federal general common law, which Congress intended. Therein lies the issue.

In which way the assignment in *Ball* failed to meet the tests of *U. S. v. New Britain*, 347 U. S. 81, 84, to wit: that the identity of the lienor, the property subject to the lien and the amount thereof be established, we are unaware. Perhaps it was no single factor but the total picture that didn't measure up to the federal general laws measure of a "mortgage". However, none of the defects in *Ball* are similar to the claimed defect in the instant case.

Our position is two-fold. That the contractual lien of the purchaser (and perhaps also of the pledgee and the mortgagee), need not and cannot be perfected in the sense of the *New Britain* criterion, that it have a fixed dollar value, applying to it at all times. It is sufficient that it is describable and ascertained to its extent. It is then "choate".

Secondly, we maintain (in addition to our argument herein, that state law determines the completeness of the property right), that this attorney's lien, as it exists under state law, is a sufficiently perfected property under a federal substantive general law to be allowed to continue to be considered property under a federal substantive law. We shall examine into the nature of the attorney's lien under the laws of New York.

One knowing the dollar value of a given piece of property or indeed having a value adds nothing to its completeness. And half or one-quarter of that is no less certain, nor complete.

The following is immutable fact. Purchasers acquire property. Property does not carry a price tag around on it. Property can be worthless which doesn't detract from its being property. Its value, if indeed it has any, is determined by the market. Market may not be constant, there may be no market; or value in the market may be very low or nil. None of this will destroy the ownership of an item. An illustration: Mr. X owns a plain, ordinary, granite pebble which no one would pay him anything for, as it is an ordinary pebble and worthless. But Mr. X prizes it highly. Whether he is demented or not is beside the point, but he thinks that someday it will have great value.

Question. Is there anything in these facts to suggest any weakness in Mr. X's title?

Does an absence of a value or a value of nothing or a doubt of the value or a questionableness of the exact amount of the value suggest a defect in X's title?

Would the situation be any different if Mr. X owned only a twenty-five per cent interest in the property?

There is one big difference between Petitioner's case and every other case previously decided by this Court. None of the other competing lienors had the title to the

specific property in question transferred to them from the taxpayer-previous-owner. All were in the process of fastening on their title from a right derived by law at the time the government slipped in and filed its lien. In the instant case title was effectively transferred to Petitioner by the retainer agreement. 29 Rocky Mountain Law Review, page 167.

Two: the nature of the attorney's lien as a property under New York State law entitles it to maintain its status as a property under a federal general law.

New York State's Judiciary Law, section 475 (p. 6) in common with similar statutes in other states in the union has enlarged the common law attorney charging lien. Thornton states, 2 Thornton, on Attorneys at Law 976 that:

> "The charging lien, originally, was defined to be the right of an attorney at law to recover compensation for his services from a fund recovered by his aid, and also the right to be protected by the court to the end that such recovery might be effected."

1). There is nothing at variance with the original common law attorney's charging lien that we claim. Our right is based on no additions. 2). Although we have not fully researched the question it is doubtful that there would be many states, if any, that would treat the attorney's lien differently that *Herlihy, supra,* was treated in New York. 3). The New York and general rule works substantial justice to all the interests involved. What greater arguments than these can be raised for the adoption of the New York rule as to attorney's liens as the federal substantive rule.

It should also be noted that the District Court's opinion that the amount of the lien was contingent was not strictly accurate in that the portion of the attorney's lien representing already occasioned disbursements became fixed at $152. (See *Spense* v. *Bode*, 57 Misc. 611, 108 N. Y. Supp. 593.)

III.

"CONSTRUCTION OF PURCHASER"

This Court has never had before it a "purchaser" under 26 United States Code, Section 6323, and a workable and clear definition has never been given by this Court. The term "purchaser" has a well defined and settled meaning in the jurisprudence of our country which should be accorded to it in accordance with the probable legislative intent. "Purchaser" is the term of art for the equitable doctrine of "bona-fide purchaser for a valuable consideration." This ancient rule of the Chancellor's is used frequently in numerous recordings and like statutes in the several states where the interest of third parties are brought into play.

The "valuable consideration" required under the doctrine is any consideration sufficient to support a simple contract as long as it is within the class that the law esteems as an equivalent given for the grant and there is an equivalent given for the grant where the purchaser enters into a binding obligation under the contract from which he cannot withdraw or otherwise innocently change his position and cannot extract himself. Petitioner, Samuel Goldstein is a "purchaser" under its definition and the facts in this case.

The attorney's lien and assignment of award of Petitioner, are entitled to priority under 26 U. S. C. 6323 which provides in part that the secret federal tax lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof shall be filed * * *."

The Notice of Federal Tax Lien here was filed on December 12, 1955, after Petitioner received title as a "purchaser" on or before the date he was retained November 18, 1955 (App. 7A). The retainer agreement provided that the client and delinquent taxpayer, Pay-O-Matic

Corporation "hereby retains * * * and hereby assigns to said attorneys, for their services twenty-five (25%) per cent of any award and interest that may be made for trade fixtures contained in said property." Petitioner is a "purchaser" and being prior in time to the filing of the Tax Lien is prior in right.

By New York State law the retainer agreement has retroactive effect dating back to the commencement of the proceeding, August 5, 1955, *Application of City of New York*, 154 N. Y. S. 2d 104. Under *Erie & Stern, supra*, the attorney's lien attached on August 5, 1955. (Under *Security Trust* this might be disregarded.) This was prior in time to the assessment dates of August 15, 1955 and November 15, 1955.

The assessment date is the date that a delinquent taxpayer's liability becomes fixed in the form of a secret lien on all his properties (except as to purchasers, etc. under 6323). Because its a secret lien, it being legally and factually impossible for any third parties to discover its existence, Congress employed the usual just rule as to saddling third parties with the liabilities of others in 6323. Judge Jackson's concurring opinion in *U. S. Security Trust Company, etc.*, 340 U. S. 47, 52. That is, Congress taking advantage of the experience of the early courts of equity and the state legislatures, took the full blown doctrine developed therein for the protection of third parties and incorporated it in the statute. Under said doctrine, first bona-fide purchasers for value, then mortgagees and pledgees and then judgment creditors were saved harmless from the effect of any previous transfer, lien or other encumbrance if they had no notice, actual or constructive (by recordings, etc.), at the time they took title. This doctrine of bona-fide purchaser was full blown and settled in 1912 when Congress incorporated it into the tax law (26 U. S. C. 6323).

We maintain, consistent with the *Erie & Stern* doctrine, that the question of who is a "purchaser" should be determined under the substantive law of the state, and that Congress legislated with reference thereto. And under the state substantive law as well as any federal substantive law Petitioner is a "purchaser".

See *Ten Eyck v. Witbeck*, 135 N. Y. 40 where the New York State Court of Appeals defined the word "purchaser" in the New York Real Property Recording Act (p. 44):

> "While every legal mode of acquisition of real property, except by descent, is denominated in law a purchase, and the person who thus acquires it a purchaser, it is evident that the word is used in this statute in a much more limited sense. It is there applied only to such grants of real estate as are obtained for money, or some other valuable consideration. It denotes a buyer of property and has reference to one of the actors in a transaction of bargain and sale, which is presumably controlled by commercial considerations."

The Court states that the doctrine is used to differentiate the transactions from gifts, and goes on (p. 48):

> "The phrase a 'purchaser in good faith and for a valuable consideration' is not peculiar to the Recording Act but is one of frequent occurrence in the statutes" and is "an expression which has been borrowed from the language of courts of equity and should be interpreted in the sense in which it is there understood * * *. A valuable consideration has been defined by, writers upon equity jurisprudence as something which the law esteems as an equivalent given for the grant, and it is, therefore, founded on motives of justice."

That Congress intended to incorporate the entire settled doctrine, there can be no doubt and as a rule of construction should be no doubt, and why there may be any doubt is

attributable only to the fact that in *U. S.* v. *Scovil*, 348 U. S. 218 this court, while not dealing with the case of a "purchaser" used the following language:

> "A purchaser within the meaning of Section 3672 (now section 6323) usually means one who acquires title for valuable consideration in the manner of vendor and vendee."

This has been interpreted in some decisions as the beginning of a new federal straight line rule of law (not an equitable doctrine), and frustrated Congress' attempt to apply fair and equitable principles. Thus the 10th Circuit Court in a decision upholding the priority of an attorney's lien *Marteney* v. *United States*, 245 Fed. 2d 135 (1957) held that "in the manner of vendor and vendee" meant "sale", and spelled out the legal doctrine of consideration in the law of contracts rather than the equitable doctrine of bona-fide purchaser's rule of valuable consideration. This court should make it clear that "purchaser" in § 6323 makes reference to the equitable doctrine of bona-fide purchaser for value.

The doctrine of bona-fide purchaser for value grew out of the rule of law that a sealed instrument imported a consideration and a gift was thus possible of enforcement. Equity, however, would not aid the promisee of a voluntary covenant, but left him to his legal remedy, see Williston on Contracts, Rev. Ed., Section 217. Equity's general policy is to protect a third person in trouble. If he is in a position where he gave nothing, or such an insufficient amount as to make his "good faith" suspect or he could legally retrieve himself from his predicament by nonperformance of his obligation, equity would not aid him.

In the last event the test would be whether the bona-fide purchaser had a right of rescission for anticipatory breach of contract or not. *Ten Eyck* v. *Witbeck*, 135 N. Y. 40, 49.

In *La Far* v. *Grimes*, 86 Fed. 2d 809 at 812 the Court said:

> "The principle upon which the doctrine of innocent purchaser for value rests, like equitable principles in general, is not a hard and fast rule of narrow application, but one to be liberally and equitably applied. Under it relief is denied to a purchaser without notice who has not paid value, on the ground that his equity arises not out of his mere lack of notice, but out of injury to him, through an innocent change of position to his prejudice. It is therefore denied where the matter of the payment remains executory between purchaser and seller, and there is no irrevocable change of position. It is granted where either the buyer has paid the purchase price or has entered with third persons into a binding obligation with regard to it, whether the obligation arises out of the execution or the assumption of negotiable promissory notes, or other form of undertaking which the buyer is able to perform, and from which he cannot in law withdraw."

A review of the situation in the instant case reveals the following. Samuel Goldstein, an attorney was retained on November 18, 1955.

From that date on till the completion of his task under the laws of New York, and the laws in most, if not all, states, he could not withdraw, *Carter* v. *Carter*, 188 Misc 156, 66 N. Y. Supp. 2d 768, and filing of the tax lien would not excuse him. He was bound to complete his services. If this court were to change the property rights, as in *Security Trust, etc.* it should change this part of the doctrine too, and excuse the attorney from further performance. This would do justice, but then it might cause a revision of the whole scheme of state law to an unrecognizably form once started. That is why the court should not tamper with state rules to start with. Petitioner hired an expert, who rendered a bill in the sum of $140 which is the fair and

reasonable value of the services rendered. A photographer was engaged who took photographs of the property. He submitted a bill of twelve dollars.

All necessary services in preparation of the case were performed prior to the filing of the government tax lien on December 12, 1955.

Thus petitioner was a "purchaser" on the date of his being retained, November 18, 1955, his having received an assignment of twenty-five percent of the award, in consideration of his promise to represent Pay-O-Matic Corp. in the condemnation proceeding. He was the owner of a quarter interest or a tenancy in common, under state law, at the time the government filed its lien.

In addition to there being "consideration sufficient to support a simple contract," there was a valuable consideration, one within the class that the law esteems as an equivalent given for the grant. The attorney had nearly completely performed his services before the federal government filed its liens. But at any rate, he had no notice when he took; the federal lien being secret. In doing so, he incurred obligations to others for disbursements, and he was, under state law, not excused from continued performance.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

ARTHUR D. GOLDSTEIN,
Attorney for Petitioner-Appellant.

SAMUEL GOLDSTEIN,
M. ROBERT GOLDSTEIN,
ARTHUR D. GOLDSTEIN,
of Counsel.

Appendix A

(Opinion of Circuit Court)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 324—October Term, 1957.

(Argued April 17, 1958 Decided April 28, 1958.)

Docket No. 24920

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

SAMUEL GOLDSTEIN,

Defendant-Appellant.

Before:

CLARK, *Chief Judge* and

LUMBARD and WATERMAN, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Sylvester J. Ryan, *Judge.*

Samuel Goldstein appeals from a summary judgment for the United States enforcing withholding tax liens against a taxpayer in priority to an attorney's lien for professional services against the same debtor.

ARTHUR D. GOLDSTEIN, of Samuel Goldstein & Sons, New York City, *for defendant-appellant.*

NICHOLAS TSOUCALAS, Asst. U. S. Atty., S. D. N. Y., New York City (Paul W. Williams, U. S. Atty., and John A. Guzzetta, Asst. U. S. Atty., New York City, on the brief), *for plaintiff-appellee.*

PER CURIAM:

Affirmed on the opinion of District Judge Ryan; and see also *United States* v. *R. F. Ball Construction Co.*, 355 U. S. 587.

Appendix B

(Judgment)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of April, one thousand nine hundred and fifty-eight.

Present:

HON. CHARLES E. CLARK,
Chief Judge,

HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

SAMUEL GOLDSTEIN,
Defendant-Appellant,

PAY-O-MATIC CORPORATION, THE CITY OF NEW YORK, and R. L. POLK & COMPANY, INC.,
Defendants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.